



## COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

41 CFR Part 51-4

RIN 3037-AA16

Prohibition on the Payment of Subminimum Wages under 14(c) Certificates as a Qualification for Participation as a Nonprofit Agency under the Javits Wagner O'Day Program

AGENCY: Committee for Purchase from People Who Are Blind or Severely Disabled.

ACTION: Notice of proposed rulemaking; request for comments.

SUMMARY: The Commission proposes to add a new qualification requirement. The requirement provides that for each nonprofit agency (“NPA”) that seeks to qualify or maintain its qualifications under the AbilityOne Program, the NPA must certify that it will not pay subminimum wages using special wage certificates authorized under section 14(c) of the Fair Labor Standards Act of 1938 to employees on all contracts or subcontracts awarded, extended (other than through the exercise of an option) or renewed under the program after the effective date of the final rule.

DATES: The Commission will consider all comments submitted electronically on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN 3037-AA16, only by the following method: Internet - Federal eRulemaking Portal. Electronic comments may be submitted through <https://www.regulations.gov>. To locate the proposed rule, use RIN 3037-AA16 or key words such as “Section 14(c),” “Committee for Purchase,” or “Subminimum Wage” to search documents accepting comments. Follow the instructions for submitting comments. Please be advised that comments received will be posted without change to <https://www.regulations.gov>, including any personal information provided.

Accessible Format: On request to the program contact person listed under FOR FURTHER INFORMATION CONTACT, individuals with disabilities can obtain this document in an alternative accessible format.

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FOR FURTHER INFORMATION CONTACT: Shelly Hammond, Director of Contracting and Policy, by telephone (703) 603-2100 or by email at [shammond@abiltyone.gov](mailto:shammond@abiltyone.gov).

During and after the comment period, you may inspect all public comments about the proposed priority and requirements by accessing [Regulations.gov](http://Regulations.gov).

Assistance to Individuals with Disabilities in Reviewing the Rulemaking Record: Upon request, we will provide an appropriate accommodation to an individual with a disability who needs assistance to review the comments for the proposed rule. If you want to contact us to request assistance, please contact the person listed in this section.

#### SUPPLEMENTARY INFORMATION:

##### **I. The AbilityOne Program**

The Javits-Wagner-O'Day Act ("JWOD") Act, *see* 41 U.S.C. 8501–8506, leverages the purchasing power of the Federal Government to create employment opportunities for individuals who are blind or have significant disabilities through a program called AbilityOne. Under JWOD, the U.S. AbilityOne Commission, an independent Federal agency, maintains a list of products and services offered by NPAs employing workers who are blind or have significant disabilities, known as the AbilityOne Procurement List. *See* 41 CFR 51-1.3. Federal Government entities procuring products or services on the Procurement List then purchase them from the sources identified by the Commission. NPAs are subject to qualification standards

during their initial qualification for the program and are subject to qualification standards to maintain their participation in the program. *See* 41 CFR 51-4.2 (initial qualification) and 41 CFR 51-4.3 (maintaining qualifications).

The AbilityOne Commission consists of 15 members appointed by the President. Eleven Commission members represent Federal agencies, including a member each from the Departments of Defense, Army, Navy, and Air Force, Agriculture, Education, Commerce, Veterans Affairs, Justice, and Labor, and the General Services Administration. *See* 41 U.S.C. 8502(b)(1). The four non-Federal Government members must include one each knowledgeable about employment issues regarding individuals who are blind and individuals with significant disabilities, and one each representing employees from NPAs who employ individuals who are blind and individuals with significant disabilities providing services or goods under an NPA that would be qualified under the program. *See* 41 U.S.C. 8502(b)(2).

As outlined in the JWOD Act, the Commission has five primary roles under the program. First, the Commission decides on the addition or removal of products or services from the AbilityOne Procurement List. *See* 41 U.S.C. 8503(a). Second, the Commission sets the fair market price the Federal Government will pay the NPAs for the products or services. *See* 41 U.S.C. 8503(b). Third, the Commission is responsible for designating nonprofit agencies to be central nonprofit agencies (CNAs) to facilitate the distribution of the orders for products and services among the participating NPAs. *See* 41 U.S.C. 8503(c). Fourth, the Commission is responsible for promulgating regulations “on other matters as necessary” to carry out the law. *See* 41 U.S.C. 8503(d)(1). Finally, the Commission is responsible for engaging in a “continuing study and evaluation of its activities” to ensure the effective administration of the law. *See* 41 U.S.C. 8503(e).

The Commission has designated National Industries for the Blind (“NIB”), whose members primarily employ individuals who are blind or have vision impairments; and SourceAmerica, whose members consist of more than 400 nonprofit organizations that typically

employ workers with more significant disabilities, as CNAs for the AbilityOne Program. The CNAs facilitate the distribution of orders, provide information as needed by the Commission, and otherwise assist the Commission in implementing its regulations. *See* 41 CFR 51-1.3 (definition of CNA); *see also* 41 CFR 51-3.2 (describing numerous responsibilities of the CNAs).

The Commission's regulations at 41 CFR 51-4.2 identify the initial qualification requirements for NPAs seeking to participate in the AbilityOne Program. For example, to be initially qualified, a NPA must submit documents demonstrating that it is incorporated and has bylaws worded to the effect that no part of the net income of the NPA may inure to the benefit of any shareholder or other individual. 41 CFR 51-4.2(a)(1)(iii)(A). The Commission then reviews the documents submitted and, if acceptable, notifies the NPA and its CNA. 41 CFR 51-4.2(b).

To maintain qualification, a NPA must annually certify that it complies with the definition of a qualified NPA as specified in 41 CFR 51-1.3 as well as several additional requirements identified in 41 CFR 51-4.3(b) and (c). The Commission receives Annual Representations and Certifications from every AbilityOne participating NPA, through the CNAs, and reviews them to determine whether the NPAs are maintaining qualification. 41 CFR 51-4.3(a). The Commission ensures that the NPA has submitted its Annual Representation and Certification and that it has complied with all the requirements on those forms. 41 CFR 51-4.2(b) and 51-4.3(a). One of the regulatory criteria that the Commission must consider in determining the suitability of a proposed addition to the Procurement List is the qualification of the nonprofit agency to furnish the product or service. 41 CFR 51-2.4(a)(2).

## **II. Section 14(c) of the Fair Labor Standards Act of 1938**

The Fair Labor Standards Act of 1938 ("FLSA") provides for the employment of certain individuals at wage rates below the generally applicable statutory minimum. 29 U.S.C. 201, *et seq.* Section 14(c) of the FLSA provides that "[t]he Administrator [of the Wage and Hour Division], to the extent necessary in order to prevent curtailment of opportunities for

employment, shall by regulation or by orders provide for . . . (2) the employment of individuals whose earning capacity is impaired by physical or mental deficiency or injury, under special certificates issued by the Administrator, at such wages lower than the minimum wage.” *See* 29 U.S.C. 214(c).

If an employer wishes to pay wages that are below the Federal minimum wage rate to workers with disabilities, the employer first must obtain an authorizing certificate from the Secretary of Labor (“Secretary”). *See* 29 U.S.C. 214(c)(1). The Secretary may issue certificates authorizing employers to pay workers with disabilities subminimum wage rates which are commensurate with those paid to workers not disabled for the work to be performed employed in the vicinity for essentially the same type, quality, and quantity of work “to the extent necessary to prevent curtailment of opportunities for employment” for such workers with disabilities. 29 U.S.C. 214(b)(1)(A). The employee’s subminimum wage is based on their productivity (no matter how limited) compared to the norm established for workers without disabilities through the use of verifiable work measurement or the productivity of experienced workers who do not have disabilities employed in the vicinity on comparable work. *See* 29 CFR 525.9(a)(3). For example, if the productivity or output of a worker with a disability is measured to be 60% as much as the productivity or output of an experienced worker who does not have a disability performing comparable work, the subminimum wage for the worker with a disability would be at least 60% of the prevailing wage (the wage rate paid to experienced workers in the vicinity who do not have disabilities performing the same or similar work). *See* 29 CFR 525.3(i).

A subminimum wage is always less than the applicable minimum wage otherwise required by section 6(a) of the FLSA, or where applicable, the prevailing wage required by the McNamara-O'Hara Service Contract Act (“SCA”).

The SCA applies to service contracts entered into between individuals or companies and the Federal Government, including the District of Columbia. The SCA requires contractors and subcontractors performing services on prime contracts in excess of \$2,500 to pay service

employees in various classes no less than the wage rates and fringe benefits found prevailing in the locality. 29 CFR 4.4(a)(1). A “service employee” (A) means an individual engaged in the performance of a contract made by the Federal Government and not exempted under 41 U.S.C. 6702(b), whether negotiated or advertised, the principal purpose of which is to furnish services in the United States; (B) includes an individual without regard to any contractual relationship alleged to exist between the individual and a contractor or subcontractor; but (C) does not include an individual employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in 29 CFR part 541. *See* 41 U.S.C. 6701(3). A subminimum wage rate is determined by comparing the productivity of the worker with a disability against the productivity of an experienced worker without a disability for the work being performed—the “standard.”

The SCA governs most Federal contracts for services. Under the SCA, the prevailing wage is the wage listed on a wage determination by the U.S. Department of Labor for the classification of work being performed. *See* 29 CFR 4.51. If a Federal contract is covered by the SCA, all service employees (including those paid pursuant to section 14(c)) must receive the full fringe benefits as listed on the wage determination. *See* 29 CFR 4.3. For example, if a worker with a disability is performing work on an SCA-covered contract in a job classification with a wage determination rate of \$22.00 per hour and the worker’s productivity is measured to be 75%, the worker must be paid at least \$16.50 per hour under a section 14(c) certificate. The worker would also be due the full fringe benefit amount.

The recently issued Executive Order 14026 “Increasing the Minimum Wage for Federal Contractors,” 86 FR 22835 (April 30, 2021), calls for an increase in the minimum wage for workers of Federal contractors and subcontractors working on or in connection with covered Federal contracts, including “any new contract; contract-like instrument; new solicitation; extension or renewal of an existing contract or contract-like instrument; and exercise of an option

on an existing contract or contract-like instrument.”<sup>1</sup> The Executive Order 14026 raises the minimum wage on covered Federal contracts to \$15.00 effective January 30, 2022. Executive Order 14026, sections 1 and 2(i). Executive Order 14026 built on Executive Order 13658, “Establishing a Minimum Wage for Contractors,” that raised the minimum wage to \$10.10 for all workers on Federal construction and service contracts on February 12, 2014. See 79 FR 9849 (Feb. 20, 2014); Executive Order 13658, section 1 and 2(a)(i). Significantly, both of these Executive orders direct that workers employed under section 14(c) certificates performing work on or in connection with covered contracts must be paid at least the full applicable Executive order minimum wage rate.

### **III. Evolution of Policies Regarding Employment of People with Disabilities**

#### **A. Historical Background on the FLSA and the Javits-Wagner-O’Day Act**

On June 25, 1938, President Roosevelt signed the FLSA into law. As part of the legislation, section 14(c) formally addressed the employment of individuals with disabilities. *See* 29 U.S.C. 214 (c).<sup>2</sup> The law created the authority for the U.S. Department of Labor to issue special certificates that permitted employers to pay less than the minimum wage in order to provide for the employment of individuals “whose earning capacity is impaired by physical or mental deficiency or injury,” *See* 29 U.S.C. 214(c). Since 1938, section 14(c)’s core premise that the productivity of an individual with a disability to perform work can be “impaired” by their

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<sup>1</sup> Section 8a of Executive Order 14026 provides that the order applies to (i)(A) a procurement contract or contract-like instrument for services or construction; (B) a contract or contract-like instrument for services covered by the Service Contract Act; (C) a contract or contract-like instrument for concessions, including any concessions contract excluded by Department of Labor regulations at 29 CFR 4.133(b); or (D) a contract or contract-like instrument entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public; and (ii) the wages of workers under such contract or contract-like instrument are governed by the Fair Labor Standards Act, the Service Contract Act, or the Davis-Bacon Act.

<sup>2</sup> The legislative origins of section 14(c) are found in the National Industrial Recovery Act of 1933 (“NIRA”). While ultimately declared unconstitutional by the Supreme Court in 1935 in *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the NIRA contained a productivity-based subminimum wage specific to individuals with disabilities. *See* William G. Whittaker, *Treatment of Workers with Disabilities Under Section 14(c) of the Fair Labor Standards Act*, CORNELL UNIVERSITY ILR SCHOOL, Summary (Feb. 9, 2005), available at [https://ecommons.cornell.edu/bitstream/handle/1813/78685/CRS\\_February\\_2005\\_Treatment\\_of\\_Workers\\_with\\_Disabilities.pdf?sequence=1&isAllowed=y](https://ecommons.cornell.edu/bitstream/handle/1813/78685/CRS_February_2005_Treatment_of_Workers_with_Disabilities.pdf?sequence=1&isAllowed=y).

disability has legally allowed employees with disabilities to be paid less than the applicable minimum wage where the individual's employer has obtained the certificate's authority to do so. Both Senator Robert F. Wagner and Congresswoman Caroline O'Day, the drafters of the 1938 legislation that authorized what is now the AbilityOne Program, the Wagner-O'Day Act, likewise expressed their intent to promote the employment of individuals who were blind by allowing NPAs to sell manufactured goods, such as mops and brooms, to the Federal Government for a fair market price.<sup>3</sup> During the more than 80-year history of the AbilityOne Program, Congress has substantially amended the JWOD Act only once. In 1971, Congress, led by Senator Jacob Javits, expanded the statute through amendments that added services provided by organizations that employ individuals with significant disabilities to the Procurement List, *see* S. Rep. No. 92-41, at 1 (1971), while maintaining an ongoing preference for goods provided by blind employees. *See* Javits-Wagner-O'Day Act of 1971, Pub. L. 92-28, sec. 6, 85 Stat. 77, 81, 82 (1971).

Congress amended the FLSA in 1986 to provide, among other changes, that subminimum wages paid to a worker with a disability under a certificate must be based on the individual's productivity commensurate with wages paid to workers without disabilities employed in the vicinity for essentially the same type, quality, and quantity of work.<sup>4</sup> *See* Pub. L. 99-486, 100 Stat. 1229 (October 16, 1986).

## B. Overview of Changes in Modern Disability Law

Two models of disability, often called the charity and medical models, emerged during the first half of the 20<sup>th</sup> century. The medical model promoted the idea that disability was something to be "cured," and this model focused on the negative impact of an individual's disability rather than on the person's skills, talents, and abilities. Similarly, the charity model reinforced the idea

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<sup>3</sup> Melia Preedy, Subminimum or Subpar? A Note in Favor of Repealing the Fair Labor Standards Act's Subminimum Wage Program, *SEATTLE UNIVERSITY LAW REVIEW*, 37 *Seattle U. L. Rev.* 1097, 1104 (2014).

<sup>4</sup> This section does not address statutory changes to the FLSA between 1938 and 1986 and is intended to provide a brief overview highlighting the most significant changes to section 14(c) and the JWOD Act.



that individuals with disabilities were “tragic” and should be “pitied.”<sup>5</sup> The original 1938 Wagner-O’Day-Act is a product of this era.

The marginalization of individuals with disabilities continued until World War I when veterans with disabilities demanded that the U.S. Government provide rehabilitation in exchange for their service to the nation. During the decade of the 1910s, Congress passed a series of laws to support soldiers who now had disabilities as a result of their service in World War I. For example, the Smith-Hughes Act made Federal funds available to states on a matching basis for vocational education programs in 1917.<sup>6</sup> Shortly thereafter, the Soldier’s Rehabilitation Act created a vocational rehabilitation program for World War I veterans with disabilities.<sup>7</sup> Finally, in 1920, the landmark Smith-Fess Act (also known as the Civilian Vocational Rehabilitation Act) established the Vocational Rehabilitation program for American citizens with physical disabilities.<sup>8</sup> The law, however, did not provide services for individuals with developmental disabilities until the Rehabilitation Act Amendments of 1954.<sup>9</sup>

Despite the passage of the Wagner-O’Day Act, most individuals with disabilities still did not have access to public transportation, telephones, bathrooms, and stores. Further, worksites with stairs offered no access for individuals with physical disabilities, and other barriers often kept talented and eligible individuals with disabilities from obtaining and maintaining jobs with private sector employers.<sup>10</sup>

With the civil rights movement in the 1960s, disability advocates joined forces with other minority groups such as people of color, women, and other marginalized groups to demand equal treatment, equal access, and equal opportunity for individuals with disabilities. In 1973, when

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<sup>5</sup> Vaughn, Jacqueline. 2003. *Disabled Rights: American Policy and the Fight for Equality*. Washington, D.C., Georgetown University Press. *See also* Richard K. Scotch, *From Good Will to Civil Rights: Transforming Federal Disability Policy* 20 (1984).

<sup>6</sup> 20 U.S.C. 11.

<sup>7</sup> 50 U.S.C. App. 1.

<sup>8</sup> Smith-Fess Act of 1920 (Public Law 66-236).

<sup>9</sup> 29 U.S.C. 4.

<sup>10</sup> Vaughn, Jacqueline. 2003. *Disabled Rights: American Policy and the Fight for Equality*. Washington, D.C., Georgetown University Press.

Congress passed the landmark Rehabilitation Act of 1973 (“Rehabilitation Act”), it included three non-discrimination sections. Sections 501 established a non-discrimination and affirmative action requirement for employees with disabilities within the Federal Government; section 503 established a non-discrimination and affirmative action requirement for employees with disabilities by Federal contractors and section 504 established a non-discrimination requirement for individuals with disabilities by any program or activity that receives Federal financial assistance. *See* 29 U.S.C. 791, 793, and 794.

In the 1980s, disability activists began to lobby for an expansion of disability rights so that entities that were not receiving Federal funds would also be prohibited from discriminating against individuals with disabilities. President George H.W. Bush signed the Americans with Disabilities Act (“ADA”) into law in 1990. This sweeping law prohibited discrimination because of disability in employment, services rendered by state and local governments, places of public accommodation, transportation, and telecommunications services. *See* 42 U.S.C. 12101–12213. Under the ADA, Congress mandated businesses to provide reasonable accommodations to individuals with disabilities (such as restructuring jobs or modifying work equipment), and that public services such as public transportation systems become more fully accessible to individuals with disabilities. Further, Congress found that “segregation” of individuals with disabilities was a “for[m] of discrimination” on the basis of disability. *See* 42 U.S.C. 12101(a)(2). Segregation, Congress recognized, is “a serious and pervasive social problem” that diminished the rights of individuals with disabilities “to fully participate in all aspects of society.” *Id.* at sec. 12101. With this piece of legislation, the U.S. government finally broke the old medical and charity models by identifying and championing the full participation, inclusion, and integration of individuals with disabilities in all levels of society.

Congress passed the ADA Amendments Act in 2008. The law restored the ADA’s definition of disability, rejecting two Supreme Court rulings that had narrowed the scope of the ADA. These amendments made it easier for individuals with disabilities to obtain protection

under the ADA and directed that the definition of “disability” shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. The ADA Amendments Act made clear that the question of whether an individual meets the definition of disability should not demand extensive analysis and that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability.

More recently, Congress addressed the Nation’s workforce development system with the passage of the Workforce Innovation and Opportunity Act (“WIOA”) in 2014. *See* 29 U.S.C. 3101 *et seq.*) WIOA reauthorized critical programs to help job seekers, including those with disabilities, to access the services they need to succeed in employment. In particular, section 188 of WIOA prohibits discrimination in the provision of services by requiring that American Job Centers and other programs and activities funded under WIOA ensure that individuals with disabilities have equal opportunity to participate in services and receive appropriate accommodations. In addition, title IV of WIOA amended the Rehabilitation Act by defining “competitive integrated employment.” *See* 29 U.S.C. 705(5). The law defines competitive integrated employment, in part, as work for which individuals receive wages equal to or exceeding the Federal, State, or local minimum wage rates.<sup>11</sup> In addition, title IV of WIOA added section 511, which requires that individuals with disabilities have access to training information and career counseling services to better enable them to achieve competitive integrated employment before and/or during employment at subminimum wages. 29 U.S.C. 794(g).

In short, since the enactment of the JWOD Act in 1938, Congress has made a consistent effort to move away from institutionalization, segregation, and unequal treatment of individuals

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<sup>11</sup> *See* 29 U.S.C. 705(5).

with disabilities, and to move toward integration, inclusion, and equal treatment. U.S. public policy and approaches to serving individuals with disabilities have changed dramatically since 1938, and the Commission recognizes that the AbilityOne Program must change with the times as well. On March 18, 2016, the Commission issued a declaration that promoted/encouraged the NPAs in the program to discontinue use of subminimum wages under section 14(c).<sup>12</sup> The Commission believes that the continued payment of subminimum wages to employees with disabilities under section 14(c) certificates is no longer aligned with modern disability policy.

### C. Recent Federal Reports on Section 14(c)

Given this evolution in the Nation’s overall approach to disability policy, the call for the phase out and elimination of subminimum wages has steadily grown in volume. In addition to civil rights organizations, many Federal Government agencies and official entities have underscored their concerns with the outdated employment model embodied by section 14(c). For example, in 2012, the National Council on Disability (“NCD”) issued a report titled “Subminimum Wage and Supported Employment” that called for the phase-out of section 14(c) certificates. *See* National Council on Disability, *Report on Subminimum Wage and Supported Employment*, September 27, 2012.

Notably, a Federal advisory committee tasked to provide recommendations about the future of section 14(c) released its final report in September 2016. In the report, the Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities (“ACICIEID” or “Committee”) urged, “Congress should amend Section 14(c) of FLSA to allow for a well-designed, multi-year phase-out of the Section 14(c) Program that results in people with disabilities entering competitive integrated employment.” *See* ACICIEID Final Report, (September 2016).<sup>13</sup> In a chapter addressing the AbilityOne Program, the Committee stated that

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<sup>12</sup> AbilityOne Commission, Declaration in Support of Minimum Wage for All People Who Are Blind or Have Significant Disabilities, March 18, 2016.  
<https://www.abilityone.gov/commission/documents/US%20AbilityOne%20Commission%20Declaration%2018Mar%202016%20Final.pdf>.

<sup>13</sup> [https://www.dol.gov/sites/dolgov/files/odep/topics/pdf/acicieid\\_final\\_report\\_9-8-16.pdf](https://www.dol.gov/sites/dolgov/files/odep/topics/pdf/acicieid_final_report_9-8-16.pdf).

AbilityOne should “immediately eliminate the use of the FLSA Section 14(c) certificates for all contractors providing products or services to Federal customers under the AbilityOne Program.” See ACICIEID Final Report, p. 59.

More recently, two Government reports have called for the repeal of section 14(c) as well as modernization of the AbilityOne Program. In October 2018, the NCD published a report, *From the New Deal to the Real Deal: Joining the Industries of the Future*. The report’s first recommendation stated, “NCD renews its call from 6 years ago for a phase-out of the 80-year-old 14(c) program and the concomitant phase-up of the systems changes necessary to allow people with disabilities to move into competitive integrated employment.” See National Council on Disability, *From the New Deal to the Real Deal: Joining the Industries of the Future*, (Washington, DC: 2018).<sup>14</sup> On September 17, 2020, the United States Commission on Civil Rights (“USCCR”) published a report titled “*Subminimum Wages: Impacts on the Civil Rights of People with Disabilities*.” The USCCR recommended, “Congress should repeal Section 14(c) with a planned phase-out period to allow transition among service providers and people with disabilities to alternative service models prioritizing competitive integrated employment.” U.S. Commission on Civil Rights, *Subminimum Wages: Impacts on the Civil Rights of People with Disabilities*, (Washington, DC: 2020).<sup>15</sup>

#### D. Biden Administration Actions During the First 100 Days

The Biden administration has made it a priority to achieve a more inclusive country for individuals with disabilities. Executive Order 13985, Advancing Racial Equity and Support for Underserved Communities, issued by President Biden on January 25, 2021, directs the entire Federal Government to pursue a comprehensive approach to advancing equity for all. 86 FR 7009 (January 25, 2021). It defines equity as the “consistent and systematic fair, just, and

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<sup>14</sup> [https://ncd.gov/sites/default/files/Documents/NCD\\_Deal\\_Report\\_508.pdf](https://ncd.gov/sites/default/files/Documents/NCD_Deal_Report_508.pdf).

<sup>15</sup> <https://www.usccr.gov/files/2020-09-17-Subminimum-Wages-Report.pdf>.

impartial treatment of all individuals,” including individuals with disabilities. *See* Executive Order 13986, section 2. Executive Order 14026, “Increasing the Minimum Wage for Federal Contractors”, 86 FR 22835 (April 30, 2021), requires an increase in the minimum wage to \$15.00 per hour beginning January 30, 2022, for “workers performing on or in connection with covered Federal contracts,” including the SCA. Executive Order 14026, section 8. Workers covered by the Executive order include workers employed under section 14(c) certificates. Executive Order 14026, section 2.

Under a Federal contract that is covered by both the SCA and Executive Order 14026, a worker performing contract work must be paid at the higher applicable wage rate. For example, for a worker with a disability performing work for an employer holding a section 14(c) certificate on a Federal contract that is covered by both the SCA and Executive Order 14026, where the SCA wage determination rate is \$14.00 per hour and the worker’s section 14(c) wage rate based on their productivity is \$9.50 per hour, the worker would be due \$15.00 per hour, which is the applicable wage rate under Executive Order 14026. The worker would also be due the full fringe benefits on the contract. The Commission will follow the Administration’s updates and guidance issued pursuant to both Executive orders and will implement such changes as may be required.

On the legislative front, as part of the efforts to target workforce development opportunities in underserved communities, the Biden Administration’s American Jobs Plan calls on Congress to eliminate subminimum wage provisions in section 14(c) of the FLSA and expand access to competitive, integrated employment opportunities and fair wages for workers with disabilities. *See* Fact Sheet: The American Jobs Plan, March 31, 2021.<sup>16</sup>

#### E. Steps Taken By the AbilityOne Commission with Regard to Use of Subminimum Wages in AbilityOne Contracts

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<sup>16</sup> <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/31/fact-sheet-the-american-jobs-plan>.

In response to the growing recognition of the civil rights issues associated with the payment of subminimum wages, the Commission has taken steps to highlight its concerns with payment of such wages in AbilityOne Programs. As mentioned previously, in 2016, the Commission members issued a “Declaration in Support of Minimum Wage for All People Who Are Blind or Have Significant Disabilities.” The declaration directed “all qualified nonprofit agencies participating in the AbilityOne Program to commit to, and begin (if not maintain), paying at least the Federal minimum wage, or state minimum wage if higher, to all employees who are blind or have significant disabilities working on AbilityOne contracts.”<sup>17</sup>

Building on the 2016 Declaration, in February 2019, the Commission called on SourceAmerica to end the process of the payment of subminimum wages by its NPAs on AbilityOne contracts within three years. The Commission’s letter acknowledged that “[T]he imperative to end the payment of subminimum wages in the AbilityOne Program is growing in strength and momentum with every passing year. It is time to pay at least the Federal minimum wage, or state minimum wage if higher, to all employees who are blind or have significant disabilities working on AbilityOne contracts.”<sup>18</sup>

In 2020, the Commission initiated a new practice to identify and report in its decision documents any planned use of subminimum wages related to products and services for additions to the AbilityOne Procurement List. Commission members are thus informed about the use of such wages before they decide whether to approve future AbilityOne contract opportunities. Through these various actions, the Commission has been working towards bringing the AbilityOne Program into greater alignment with other disability employment laws, such as

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<sup>17</sup> U.S. AbilityOne Commission, Declaration in Support of Minimum Wage for All People Who Are Blind or Have Significant Disabilities, March 16, 2016.  
<https://www.abilityone.gov/commission/documents/US%20AbilityOne%20Commission%20Declaration%2018Mar%2016%20Final.pdf>.

<sup>18</sup> AbilityOne Letter to Mr. Norman Lorentz, Chair of the SourceAmerica Board, February 19, 2019.  
[https://www.abilityone.gov/media\\_room/documents/Commission%20Chair%20Ltr%20to%20NIB%20&%20SourceAmerica%20Board%20Chairs%2020200323.pdf](https://www.abilityone.gov/media_room/documents/Commission%20Chair%20Ltr%20to%20NIB%20&%20SourceAmerica%20Board%20Chairs%2020200323.pdf).

WIOA. The Commission now believes it is time to discontinue the practice of NPAs paying employees with disabilities subminimum wages using section 14(c) certificates on any new, extended, or renewed contract, with the exception of the exercise of options in an existing contract.

#### **IV. Specific Proposed Changes to the NPAs' Payment of Subminimum Wages under Section 14(c) Certificates for AbilityOne Contracts**

As set forth in the regulatory procedures section below, the Commission proposes to amend the qualification requirements for NPAs that participate in the AbilityOne Program, as set forth in 41 CFR 51-4.2 and 51-4.3. The Commission proposes to add a requirement for initial qualification that a NPA must provide a certification that it will not pay subminimum wages using special wage certificates authorized under section 14(c) of the FLSA to employees on any contract or subcontract awarded under the program. In addition, the Commission proposes to add a requirement for maintaining qualification that a NPA provide a certification that it will not pay subminimum wages using section 14(c) certificates to employees on contracts or subcontracts awarded under the program. This requirement would not apply to the exercise of any options on an existing contract up to the time of the contract's extension or renewal, except as otherwise required by law, such as on the exercise of an option on an existing contract covered by Executive Order 14026. The NPA must comply with the requirement at the time of the extension or renewal of an existing contract.

The Commission is seeking comments specifically on the following questions:

- 1) Should the requirement that a qualified NPA not use section 14(c) certificates to pay subminimum wages on AbilityOne contracts apply to the renewal or extensions of contracts once they expire or only to new contracts? The Commission is interested in receiving data in support of any comment on this question.
- 2) Should the requirement that a qualified NPA not use section 14(c) certificates to pay subminimum wages on AbilityOne contracts apply to the exercise of an option on an



existing contract? The Commission is interested in receiving data in support of any comment on this question.

- 3) What impact, if any, would the proposed regulatory change make to the receipt of social security benefits, such as Supplemental Security Income (SSI) or Social Security Disability Insurance (SSDI) and attendant government health insurance, such as Medicare and Medicaid, to employees with disabilities? The Commission is also interested in receiving suggestions on how to address any possible adverse impacts that may be identified.
- 4) How much time, if any, would be necessary for NPAs to meet the new requirements?

## **V. Regulatory Procedures**

*Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Review)*

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. It is anticipated that this will be a “significant regulatory action” and, therefore, subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

### **A. Costs of Prohibiting the Use of Subminimum Wages under Section 14(c) Certificates as a Qualification for Participation as a Nonprofit Agency in the AbilityOne Program**

The Commission believes that the costs of requiring all new NPAs seeking to become qualified to participate in the AbilityOne Program and all existing NPAs wishing to maintain their qualification in the AbilityOne Program to certify that they will not pay subminimum wages

under a section 14(c) certificate on contracts are not substantial and are outweighed by the benefits. NPAs participating in the AbilityOne Program are currently represented by two CNAs -- NIB and SourceAmerica. NIB represents only one NPA that uses a section 14(c) certificate, but the NPA does not pay subminimum wages on its AbilityOne contracts.

The Commission does not currently collect data directly from the CNAs or the NPAs participating in the program regarding the NPAs' use of section 14(c) certificates on AbilityOne contracts or the number of employees with disabilities paid subminimum wages under those contracts or the amount of those wages. The Commission requested information from SourceAmerica on the use of section 14(c) certificates because SourceAmerica's NPAs voluntarily report this data to the CNA.<sup>19</sup> According to information provided by SourceAmerica, 160 of the 412 NPAs it represents (38 percent) hold and use section 14(c) certificates to pay subminimum wages on one or more AbilityOne contracts, as of the end of the first quarter of 2021.<sup>20</sup>

SourceAmerica reports that the number of NPA employees with disabilities working under a section 14(c) certificate decreased from 1,212 employees in the first quarter of 2020 to 674 employees in the first quarter of 2021.<sup>21</sup> AbilityOne NPAs employ approximately 42,000 individuals with disabilities, so the 674 employees with disabilities account for fewer than two percent of individuals with disabilities employed by AbilityOne NPAs.<sup>22</sup> Therefore, although the number of NPAs affected by this proposed rule may be 42 percent of the NPAs participating in the AbilityOne program, the actual number of employees with disabilities for whom these NPAs will have to increase wages is a small number of NPA employees. The costs of this rule will be further reduced because the NPAs holding service contracts that are covered by Executive Order 14026 will already have to pay at least \$15.00/hour to employees with disabilities under

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<sup>19</sup> The Commission notes that because SourceAmerica data is self-reported by the NPAs and fluctuates by quarter, the data should be viewed as estimates and not exact figures.

<sup>20</sup> Statistics provided by SourceAmerica Interim Chief Executive Officer in a report to the Commission, posted at [https://www.abilityone.gov/commission/public\\_meeting\\_archive.html](https://www.abilityone.gov/commission/public_meeting_archive.html).

<sup>21</sup> U.S. AbilityOne Commission Report to the President, March 2021, p. 22.

<sup>22</sup> *Id.*, p. 2.

AbilityOne service contracts pursuant to that Executive order and its implementing regulations beginning January 30, 2022. Executive Order 14026, section 2(a)(1).

A. Benefits

Paying wages to AbilityOne employees that are equal to the wages paid to other employees without disabilities performing the same or similar work will provide both tangible and intangible benefits to employees with disabilities and to society at large.

The tangible financial benefits are the same that would accrue to any worker who receives a wage increase. Employees with significant disabilities who have been receiving subminimum wages for their work will now receive the Federal minimum wage, state minimum wage, or prevailing wage, depending on the applicable law. The result will be that such individuals will have an increased ability to make life decisions that require additional financial resources, such as where to live, what activities to engage in, and other basic aspects of life.

The intangible benefits are, by definition, harder to quantify, but those benefits will accrue both to individuals with significant disabilities and society at large. Paying employees with disabilities the same wage legally required to be paid to employees without disabilities doing the same or similar work sends a message of respect and a commitment to equity. Work provides structure, purpose, and a sense of meaningful contribution to family and community. That is why the AbilityOne Program is so important for individuals with significant disabilities. At the same time, in our society, the wages paid for work send a message about the value of that work. Paying equivalent wages to employees with and without disabilities who are capable of and are doing the same or similar work as employees without disabilities reinforces that such work is equally valued and that individuals with disabilities are fully included in our society.

The Commission recognizes that an increase in wages for employees with significant disabilities has the potential to trigger benefits reductions, depending on individual circumstances, for employees who are recipients of government benefits programs such as Social Security Disability Insurance (“SSDI”) or Supplemental Security Income (“SSI”), with attendant

implications for coverage under Medicaid that often provides greater benefits than private health insurance. AbilityOne employees with disabilities will need assistance in assessing that possibility and in determining options to ensure that they do not lose important government benefits. The Commission expects to work closely with the CNAs and NPAs to assist in this effort. On balance, the Commission believes the overall benefits that the proposed rule will provide for AbilityOne employees with disabilities outweigh the potential benefits challenges that some AbilityOne employees will face.

#### Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601 *et seq.*, requires agencies to prepare regulatory flexibility analyses, and to develop alternatives wherever possible, in drafting regulations that will have a significant impact on a substantial number of small entities. The rule only applies to NPAs that propose to use or currently use certificates authorized by section 14(c) of the FLSA to pay subminimum wages on AbilityOne contracts. The majority of AbilityOne participating nonprofit agencies do not hold or use these special certificates.

#### Unfunded Mandates Reform

This proposed rule does not include any Federal mandate that may result in increased expenditures by State, local, and tribal governments, taken together, of \$100 million or more, or in increased expenditures by the private sector of \$100 million or more.

#### Paperwork Reduction Act

The proposed rule will require the Commission to collect information within its Annual Representations and Certifications regarding the certification not to pay subminimum wages under section 14(c) certificates to employees. The Commission collects similar information (overall wages) but does not currently or specifically collect a certification not to pay subminimum wages under section 14(c) certificates to employees.

The following is a summary of the need for and objectives of the proposed rule. A more complete discussion of various aspects of the proposed rule can be found in the preamble. The

payment of subminimum wages under section 14(c) certificates to employees working on Federal contracts in the AbilityOne Program is not consistent with modern disability policy, diminishes the value of the work and the workers, and diminishes support for the program itself. The Commission proposes to add a new requirement for initial qualification and maintaining qualification for NPAs to participate in the AbilityOne Program. The requirement provides that for a NPA to qualify or maintain its qualification under the AbilityOne Program, the NPA must certify that on all contracts awarded, extended (other than through the exercise of an option), or renewed after the effective date of this rule, the NPA will not use a special wage certificate authorized under section 14(c) of the FLSA to pay subminimum wages to employees on any contract or subcontract awarded under the program.

#### Small Business Regulatory Enforcement Fairness Act of 1996

This proposed rule would not constitute a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This proposed rule will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based companies to compete with foreign-based companies in domestic and export markets.

**Authority:** 41 U.S.C. 8503(d).

#### **List of Subjects in 41 CFR Part 51-4**

Government procurement, Individuals with disabilities, Reporting and recordkeeping requirements.

Accordingly, the Commission proposes to amend 41 CFR part 51-4 as set forth below:

#### **PART 51-4 - NONPROFIT AGENCIES**

1. The authority citation for part 51-4 continues to read as follows:

**Authority:** 41 U.S.C. 46-48c.

2. Amend § 51-4.2 by adding paragraph (a)(1)(iv) and revising paragraph (b) to read as follows:

## **§ 51-4.2 Initial qualification.**

(a) \* \* \*

(1) \* \* \*

(iv) A certification that the nonprofit agency will not pay subminimum wages using special wage certificates authorized under section 14(c) of the Fair Labor Standards Act of 1938 (29 U.S.C. 214(c)) to employees on any contract or subcontract awarded under the program.

\* \* \* \* \*

(b) The Committee shall review the documents submitted and, if they are acceptable, notify the nonprofit agency by letter, with a copy to its central nonprofit agency, that the Committee has verified its nonprofit status and certification under paragraph (a)(1)(iv) of this section under the Javits-Wagner-O'Day (JWOD) Act.

\* \* \* \* \*

3. Amend § 51-4.3 by adding paragraph (b)(10) to read as follows:

## **§ 51-4.3 Maintaining qualification.**

\* \* \* \* \*

(b) \* \* \*

(10)(i) Except as provided in paragraph (b)(10)(ii) of this section, provide certification that the nonprofit agency will not pay subminimum wages using special wage certificates authorized under section 14(c) of the Fair Labor Standards Act of 1938 (29 U.S.C. 214(c)) to employees on any contract or subcontract under the program.

(ii) The requirement of paragraph (a) of this section does not apply to the exercise of any options on an existing contract up to the time of the contract's extension or renewal, except as otherwise required by law.

\* \* \* \* \*

Michael R. Jurkowski,  
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[FR Doc. 2021-22118 Filed: 10/8/2021 8:45 am; Publication Date: 10/12/2021]